LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
OCT 19 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 388

LEROY J. ROBERTSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit

---

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	8
Reasons for granting the writ	8

CITATIONS

Cases:

Arsham Armirikian v. United States, decided March 29, 1951, not yet reported (1951 P. H. 42, 528)	9
Bogardus v. Commissioner, 302 U. S. 34	9
Commissioner v. Jacobson, 336 U. S. 28	9
Kerr, v. United States, 131 F. 2d 450	9
McDermott v. Commissioner, 150 F. 2d 585	9
Schall v. Commissioner, 174 F. 2d 893	9
Williams v. United States, 84 Fed. Supp. 362	9

Statute:

Internal Revenue Code:

Section 22 (a) (b)	10
Section 107 (b)	9, 10

Miscellaneous:

Treasury Regulations 111:

Section 29.22(a)-1	11
Section 29.22(a)-2	11
Section 29.107-2	9, 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. ____

LEROY J. ROBERTSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Leroy J. Robertson prays that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals, Tenth Circuit, reversing the judgment of the United States District Court for the District of Utah, with instructions to enter judgment for the United States of America (R. 55).

OPINIONS BELOW

The oral opinion of the District Court, (R. 31) is not reported. The opinion of the Circuit Court of appeals (R. 49) is not reported.

JURISDICTION

The judgment of the Circuit Court of appeals was entered on July 10, 1951 (R. 55). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an award of $25,000 received by the taxpayer as the winner of the Reichhold Music Award, a Pan-American symphony composition contest, was includible in his gross income as defined in Section 22(a) of the Internal Revenue Code, or constituted a gift excludible from his gross income under Section 22 (b) (3).

2. Whether in computing the tax under Section 107 (b) of the Internal Revenue Code, the income should be apportioned over the years 1937, 1938 and 1939, the 36-months period in which the work on the symphony was performed by the taxpayer, or over the 36-months period covering the taxable year 1947, when the award was received, and the two years immediately preceding the taxable year.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the appendix, *infra*, pp.

STATEMENT

The taxpayer is a musician and composer by profession. During the taxable year 1947, and for many years prior thereto, he was Professor of Music at Brigham Young University, and later was similarly employed at the University of Utah. In 1936, he commenced work on a symphony named

"Trilogy," and completed the work in 1939. Upon its completion the work was placed in taxpayer's files along with other completed musical compositions (R. 9).

In the year 1945, Henry H. Reichhold, a philanthropist, who was also president of the Detroit Symphony Orchestra, announced the "Reichhold Music Award" contest whereby he offered three awards of $25,000, $5,000 and $2,500, respectively, for the best symphonic works written by native born composers of North, Central and South America (R. 10). The broad purpose underlying the contest was as follows:

> "The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorious new work for full symphony orchestra by a native composer of the Americas.
>
> "It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.
>
> "The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 37).

Winners of the awards were to be selected from among composers who submitted entries in accordance with published terms and conditions of the contest (R. 10, 39-45). These terms and conditions included the following (R. 41):

> "5. Compositions must not have been published or publicly performed, either in full or in part, prior to entry in this contest.

"6. A candidate may submit only one work. Such work must be submitted with an official Entry Blank, wrapped flat, postage prepaid.

"7. Candidates must submit their compositions to the Preliminary Award Jury in the country of their citizenship not later than September 1, 1945.

"8. The score MUST BE SIGNED WITH A PSEUDONYM OR MOTTO, AND MUST BEAR NO MARKINGS THAT WOULD REVEAL THE IDENTITY OF THE COMPOSER. Attached to the score MUST be an Official Envelope duly completed and containing an Official Entry Blank duly completed. Envelopes will not be opened until after the juries have made their decision. Candidates are urged to retain copies of their manuscripts.

"9. The final decisions will be rendered by a jury of internationally known music authorities, under the chairmanship of Karl Krueger, such jury to be named by the Reichhold Music Award Committee.

"10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

"12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of compositions winning Cash Awards, Honorable Mention or Certificates of Merit.

"13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work re-

ceiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award.

After announcement of the contest the taxpayer was urged to enter his composition "Trilogy" but he did not do so as the original announcement required that "parts must accompany each score" (Par. 4, R. 41). Taxpayer had had trouble with his eyes and felt that they would not stand the strain that would be entailed in writing the parts (R. 10, 23). However, when the "Amendments to the Reichhold Music Award Contest Rules" (R. 45), deleted the requirement that parts must accompany the score, taxpayer decided to enter his composition and did so on or about February 18, 1946, by filing an official entry blank (R. 10-11, 43). The entry blank recited (R. 43):

"1. I, the undersigned (represented by the pseudonym or motto * * * NOSTREBOR. * * *), submit herewith a composition entitled: * * * TRILOGY * * * for the purpose of participating in the Reichhold Music Award, 1945 upon the terms and conditions printed on the reverse side of this blank.

"2. I agree that it shall be judged by any committee or committees selected by you whose decision shall be final.

"3. I warrant that I am the sole composer of this composition; that it is an original work; and that it has never been published or publicly performed, either in part or in full.

"4. I understand that the composition submitted by me shall remain my property except that, should I win one of the three Cash Awards, I grant to the Detroit Orchestra, Inc., all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"5. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a

Certificate of Merit, I grant to the Detroit Orchestra, Inc., the first performance rights of said composition in each or all of the countries named on the reverse side of this page.

"6. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the right to designate the publisher of said composition.

* * * * *

"13. I agree to execute and deliver to the Detroit Orchestra, Inc., any documents which it may deem necessary for the purposes set forth in paragraphs '4', '5' and '6' hereof.

"14. If I am a member of any society of composers and/or have assigned any rights or have given any licenses contrary to those conveyed in paragraphs '4', '5' and '6', I agree that, should my composition be tentatively selected to receive one of the Cash Awards, I shall obtain a release from such assignment or license insofar as they are at variance with paragraphs '4', '5' and '6' and if I fail to furnish the same within 60 days, after notice to me, I shall automatically be eliminated from the contest.

"15. I have read the terms and conditions printed on both sides of this entry blank and hereby agree to all the stipulations thereof, * * *"

The composition entered by taxpayer was selected by the award committee as the best one submitted and taxpayer received the $25,000 cash award on December 14, 1947 (R. 11).

In his 1947 income tax return, taxpayer included the $25,000 prize in his gross income and claimed the benefits of Section 107 (b) of the Internal Revenue Code, computing the tax as though the $25,000 had been received ratably during the last 36 months in which he was engaged in composing the symphony, or during the years 1937, 1938, and 1939. This resulted in a tax of $1,121.56 which was

duly paid by the taxpayer (R. 11). Attached to the return was a statement claiming that no part of the award was taxable income and that the taxpayer intended to file claim for refund of the tax paid (R. 2, 9). Thereafter, taxpayer on February 16, 1948, duly filed a claim for refund for the tax paid (R. 3-4).

Six months having elapsed since the filing of the claim for refund (R. 4), the taxpayer filed suit on January 24, 1949, for the recovery of the tax (R. 15). Thereafter, on or about October 24, 1949, the Commissioner assessed a deficiency of tax in the amount of $4,605.55, plus accrued interest of $444.34; or a total sum of $5,049.89. This sum was paid to the Collector November 7, 1949. The Commissioner assessed the deficiency on the ground that the tax should have been computed under Section 107 (b) as though the $25,000 had been received ratably over the 3-year period ending with the taxable year 1947 rather than over the 36 months ending December 31, 1939, during which the work was done (R. 4, 9, 12). Taxpayer filed an amended and supplemental claim for refund on November 22, 1949 (R. 4), and on June 12, 1950, filed his amended complaint (R. 1-7).

The District Court found as a fact that the taxpayer,

> "did not produce the composition 'Trilogy' for the purpose of entering it in any contest neither for the purpose of selling it to Mr. Reichhold or to anybody else nor to produce income. It was the inspiration of an artist, his desire to do this creative work and was motivated dominantly and primarily for reasons other than monetary. On the other hand, Mr. Reichhold's purpose in announcing the contest and making the awards was to 'give'—not to employ or to buy or sell and the award made to the plaintiff was not in exchange for the right to capitalize on his opus. The composition remained and remains the property of the plaintiff and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures, etc., the right to first performance and the right to designate the publisher of the composition" (R. 11).

and concluded that the award constituted a gift, not includible in taxpayer's income and granted judgment in favor of the taxpayer for the full amount of the tax paid for the year involved (R. 12).

The Circuit Court of Appeals reversed the judgment of the District Court, not only on the main issue upon which that court's decision rested, but also on the secondary issue that was not decided by that court in view of its decision on the main issue, and remanded the case to the District Court with instructions to enter judgment for the United States (R. 55).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals, Tenth Circuit erred:

(1) In holding that the cash award received by the taxpayer as the winner of the Reichhold Music Award was includible in his gross income.

(2) In holding that the amount received as the award in 1947 should be apportioned over the three years just preceding the taxable year, the taxable year being included, rather than over the thirty-six months period in which the work on the symphony was performed by the taxpayer.

(3) In reversing the decision of the District Court.

REASONS FOR GRANTING THE WRIT

Two issues were presented to the District Court on the pleadings. The first issue presented the question whether the award received by the taxpayer was a gift or income. The second issue, pertinent only in the event the court held the award to be income and not a gift, involved the question as to the proper period to which the income should be allocated. The District Court did not consider the second issue and made no decision thereon. The Circuit Court of Appeals, however, as is indicated above, decided both issues against the taxpayer and remanded the case to the District Court with instructions to enter judgment for the United States.

On the main issue as to whether the award was a gift, the decision of the Circuit Court of Appeals, is in direct conflict with the decision of the United States Court of Appeals, District of Columbia in *McDermott* v. *Commissioner*, 150 F. 2d 585 and also with the decision of the United States District Court, District of Maryland in *Arsham Amirikian* v. *United States*, decided March 29, 1951, not yet reported but found in paragraph 72, 528 Prentice-Hall 1951. Cf. *Schall* v. *Commissioner*, 174 F. 2d 893 (C. C. A. 5th).

It being a fact question as to whether the award received by the taxpayer was a gift, and the District Court having found the fact of gift (R. 11, 32-33), the United States Court of Appeals, Tenth Circuit, exercised its appellate function contrary to the principles decided by the Supreme Court in *Bogardus* v. *Commissioner*, 302 U. S. 34 and *Commissioner* v. *Jacobson*, 336 U. S. 28. Cf. *Kerr* v. *United States*, 131 F. 2d 450 (CCA 7th).

The decision of the United States Court of Appeals, Tenth Circuit on the question as to the proper allocation of the award is squarely in conflict with the decision of the Court of Claims in *Williams* v. *United States*, 84 Fed. Supp. 362 and contrary to the word as well as the spirit of Section 107 (b), Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 107 (b)) and Treasury Regulations 111, Sec. 29.107-2.

The questions involved herein are important questions of federal law which have not been, but should be settled by this Court.

CONCLUSION

For the reasons set forth above this petition for writ of certiorari should be granted.

Respectfully submitted,

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner,
48 No. University Avenue,
Provo, Utah.

APPENDIX

Internal Revenue Code:

"SEC. 22. GROSS INCOME.

"(a) *General Definition.* — 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

"'(3) [As amended by Section 111(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Gifts, bequests, devises and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *'

* * * * *

"(26 U. S. C. 1946 ed., Sec. 22.)

"SEC. 107 [As added by Section 220(a) of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Section 139(a) of the Revenue Act of 1942, *supra*, and Section 119(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

* * * * *

"(b) *Patent, Copyright, Etc.*—For the purposes of this subsection, the term 'artistic work or inven-

tion', in the case of an individual means a literary, musical, or artistic composition of such individual or a patent or copyright covering an invention of or a literary, musical, or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months.

* * * * *

"(26 U. S. C. 1946 ed., Sec. 107.)"

Treasury Regulations 111, promulgated under the Internal Revenue Code:

"Sec. 29.22(a)-1. *What Included in Gross Income.*—Gross Income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

* * * * *

"Sec. 29.22(a)-2. *Compensation for Personal Services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons

in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. * * *

* * * * *

"Sec. 29.107-2. [As amended by T. D. 5458, 1945 Cum. Bull. 45.] *Artistic Work or Invention.*—Section 107(b) provides that if, in the taxable year, the gross income of an individual from an artistic work or invention of such individual covering a period of 36 calendar months or more (from the beginning to the completion thereof) is not less than 80 per cent of the sum of (1) the gross income therefrom in the taxable year, and (2) the gross income therefrom in previous taxable years and in the 12 months following the close of the taxable year, then the tax attributable to such gross income in the taxable year shall not be greater than the aggregate of the taxes attributable thereto had it been received ratably over (1) the part of the period of the work which precedes the close of the taxable year, or (2) a period of 36 calendar months, whichever of such periods is the shorter. * * *

* * * * *

"The method of allocating the gross income from the artistic work or invention to the taxable years in which falls any of the calendar months (not exceeding 36 calendar months) included within the part of the period of work which precedes the close of the current taxable year may be illustrated by the following examples:

"'*Example (1).* On October 1, 1942, A, an individual, who makes his returns on a calendar year basis and on the basis of cash receipts and disbursements, received $36,000 in full payment

for a musical composition, the work on which was commenced by A on July 10, 1938, and completed on January 29, 1943. Although the period of work covers 55 calendar months, allocations may be made to only the last 36 calendar months included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $1,000 ($36,000 divided by 36) must be allocated to each of the 36 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated in 1940, $12,000 in 1941, and $12,000 in 1942 (the current taxable year).'"

* * * * *